

**OCCUPATIONAL SAFETY
AND HEALTH STANDARDS BOARD**

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SUMMARY
PUBLIC MEETING/PUBLIC HEARING/BUSINESS MEETING
May 20, 2010
San Diego, California

I. PUBLIC MEETING

A. CALL TO ORDER AND INTRODUCTIONS

Chairman MacLeod called the Public Meeting of the Occupational Safety and Health Standards Board (Board) to order at 10:00 a.m., May 20, 2010, in Room 310 of the County Administration Center, San Diego, California.

ATTENDANCE

Board Members Present
Chairman John MacLeod
Jonathan Frisch, Ph.D.
Bill Jackson
Jack Kastorff
Guy Prescott
Willie Washington

Board Members Absent

Board Staff
Marley Hart, Executive Officer
Mike Manieri, Principal Safety Engineer
Tom Mitchell, Senior Safety Engineer
David Beales, Legal Counsel
Bernie Osburn, Staff Services Analyst
Chris Witte, Executive Secretary

Division of Occupational Safety and Health
Michael Donlon, Senior Safety Engineer

Others present
Dave Harrison, Operating Engineers
Local 3
Dan Leacox, Greenberg Traurig
Kate Smiley, AGC
Steve Johnson, ARC-BAC
Joan Gaut, CTA
Bruce Wick, CalPASC

Pat Karinen, Piledrivers Local #34
Terry Thedell, San Diego Gas & Electric
Elizabeth Treanor, PRR
Kevin Bland, CFCA, RCA
Dick Roberts, Cal-OSHA
Jay Weir, AT&T

Kevin Thompson, Cal-OSHA Reporter
Wendy Holt, CSATF/AMPTP
Peter Robertson, CalTrans

James Jack, Emissions Control Tech.
Gary Perlichek, Foundation Contractors
Vince Hundley, AGC of San Diego

B.

OPENING COMMENTS

Chair MacLeod indicated that this portion of the Board's meeting is open to any person who is interested in addressing the Board on any matter concerning occupational safety and health or to propose new or revised standards or the repeal of standards as permitted by Labor Code Section 142.2

Chair MacLeod asked that comments regarding Petition 507 be deferred to the Business Meeting portion in order to provide commenters an opportunity to receive briefings from Board and the California Air Resources Board (CARB) staff prior to presenting their comments.

Terry Thedell, Health and Safety Advisor for Sempra Energy Utilities, stated that during last month's Board meeting, Dr. Frisch expressed his interest in reviewing the practice of incorporating by reference (IBR) standards that have been developed by private technical societies. Sempra shares his concern, as expressed in Mr. Thedell's recent letter to the Board. He asked the Board to recognize that the IBR rulemaking process is flawed in that it has inadvertently elevated these private safety and health technical societies to a higher level of importance comparable to Cal-OSHA standards and pulling the trigger of necessity for rulemaking action by the Board. Several of the recent actions of the Board, such as the adoption of the High Visibility Apparel, reflect the IBR process. When private technical societies have recently modified their standards, the Board staff have advocated changes to the Cal-OSHA standards.

Mr. Thedell is not disputing the relative merits of these individual changes to safety standards, but he does question whether the California Code of Regulations IBR process can also be used at considerable cost to develop the safety and health standards without the direct participation of affected California employers. It is not necessarily a question of difficulty in obtaining the standards themselves, but the access to the technical societies whether or not they are in the process of changing or modifying these particular standards. Mr. Thedell recognizes that the IBR rulemaking process is an internal process for the Board, and he asks that the Board staff take the time to evaluate the IBR process to improve it and reduce the need for employers to reapply for even more variances from IBR revised standards.

Elizabeth Treanor, Director of the Phylmar Regulatory Roundtable, spoke in support of Mr. Thedell's remarks.

C.

ADJOURNMENT

Chair MacLeod adjourned the public meeting at 10:07 a.m.

II. PUBLIC HEARING

A. PUBLIC HEARING ITEM

Chair MacLeod called the Public hearing of the Board to order at 10:07 a.m., May 20, 2010, in Room 310 of the County Administration Center, San Diego, California.

Chair MacLeod opened the Public Hearing and introduced the first item noticed for public hearing.

1. TITLE 8: **CONSTRUCTION SAFETY ORDERS**
Division 1, Chapter 4, Subchapter 4, Article 12
Sections 1600-1601
Pile Driving and Pile Extraction

Mr. Manieri summarized the history and purpose of the proposal, and he indicated that it was ready for the Board's consideration and the public's comment.

Pat Karinen, Senior Field Representative for Piledrivers Local Union #34, summarized his written comments submitted on April 19, 2010.

Gary Perlichek, Vice President of Foundation Pile Driving Contractors, expressed agreement with Mr. Karinen's concerns. He further stated that subsection (p)(3) is not entirely clear regarding planting the bottom of the leads on the ground to stabilize them; he stated that most of the batter piles are driven with swinging leads, so they are just hanging off the line. He asked that the subsection be clarified. Subsection (q)(3) provides that all employees be kept clear when piling is being hoisted into the leads. However, it is necessary to have at least one person or sometimes two people handle the pile and lock it, and Mr. Perlichek asked that language to that effect be added to the proposal. He stated that Section 1600.1(b) discusses piles extracted by drop impact, and he expressed uncertainty as to the definition of "drop impact." He asked for that to be clarified.

Mr. Jackson stated that the language in subsection (a) regarding site layout discusses the "controlling contractor" without providing a definition for that term. He stated that it should be clear to end users who the controlling contractor is. He stated that there is no federal counterpart for this language, and this does not appear to have been discussed at the advisory committee meeting, so the origin of the terminology is not clear and there is nothing in the ISOR discussing the necessity for it. He stated that in his experience, there are occasions when pile driving is done before there is a general contractor present to supervise the work. It appears that the Board is setting a standard to delegate responsibility for part of pile driving to someone who may not be involved in the pile driving at all. He wants to ensure the Board's intent if that language is

adopted so that end users know who is meant when discussing the controlling contractor.

Chair MacLeod introduced the next item noticed for public hearing.

1. TITLE 8: **GENERAL INDUSTRY SAFETY ORDERS**
Division 1, Chapter 4, Subchapter 7, Article 116
Section 5278
Loading of Explosive Materials

Mr. Manieri summarized the history and purpose of the proposal, and he indicated that it was ready for the Board's consideration and the public's comment.

There was no public comment on this matter.

Dr. Frisch asked whether members of industry and labor were consulted during the crafting of the standard. Mr. Manieri responded that representatives of the blasting industry were consulted, but he was uncertain whether labor had been and he would discuss the matter with Mr. Boersma.

B. ADJOURNMENT

Chair MacLeod adjourned the Public Hearing at 10:25 a.m.

III. BUSINESS MEETING

Chair MacLeod called the Business Meeting of the Board to order at 10:25 a.m., May 20, 2010, in Room 310 of the County Administration Center, San Diego, California.

A. PROPOSED SAFETY ORDER FOR ADOPTION

1. TITLE 8: **GENERAL INDUSTRY SAFETY ORDERS**
Division 1, Chapter 4, Subchapter 7
Article 76, Section 4650
Article 81, Section 4797
Article 85, Section 4823
Acetylene (Horcher)
(Heard at the April 15, 2010, Public Hearing)

Mr. Manieri summarized the history and purpose of the proposal and indicated that the package is now ready for the Board's adoption.

MOTION

A motion was made by Mr. Jackson and seconded by Dr. Frisch that the Board adopt the proposal.

A roll call was taken, and all members present voted “aye.” The motion passed.

B. PROPOSED VARIANCE DECISIONS FOR ADOPTION

Mr. Beales stated that the consent calendar contains a number of items that are marked “Grant or Deny;” those items were heard just prior to the Board meeting and the recommendation in all of those matters is that the variances be granted in accordance with the proposed decisions that are in the Board packet.

However, the first item, variance file number 08-V-089M1, regarding the Waterstone Condominium Association, is an ISIS-I matter. It is on today’s calendar because, when all of the other ISIS-I amendments were heard, there was a change of ownership, and Board staff was waiting for the paperwork to catch up with the case, a process which has taken several weeks, but it finally has done so. Unfortunately, the paperwork came in yesterday, and Mr. Beales has not had a chance to review it fully, as he was out of the office. It is different from the form they were going to send, but it sounds better than the one they were going to submit, based on what he heard on the phone.

Thus, two actions are necessary: the first is that Mr. Beales needs to review the document that constitutes the applicant’s signed original amendment of the variance application; and that document needs to be reviewed by the Division and the Board staff. Based on these remarks, Mr. Beales requested that the Board approve the variance today but to do so with the understanding that the hearing officer has the option of reopening the record and rescheduling the matter for next month’s Board meeting if, by 5:00 p.m. on May 28, the hearing officer determines to do so.

Dr. Frisch asked that the matter be removed from the consent calendar until next month. Mr. Beales responded that it is a safety issue, and the applicant may want to have it proceed before next month. He suggested that they be allowed to do that, as the matter under discussion is the replacing of Kevlar ropes with steel wire ropes. Ms. Estrella read the document verbatim over the phone to Mr. Beales, and it sounds as though it is in order. Ms. Estrella also told Mr. Beales that the document was properly signed. It is simply a matter of procedural comprehensiveness to allow the Division and the Board staff the opportunity to review it, although he does not imagine that there will be a problem with it.

Dr. Frisch suggested that this matter be removed from the consent calendar for a separate vote; there was no opposition to this suggestion.

MOTION

A motion was made by Dr. Frisch and seconded by Mr. Kastorff to adopt the consent calendar as modified.

A roll call was taken, and all members present voted “aye.” The motion passed.

A motion was made by Mr. Kastorff and seconded by Mr. Washington to adopt the proposed decision for variance file number 08-V-089M1 and to give the hearing officer the authority to decide by 5:00 p.m. on May 28, 2010, whether the record should be reopened and a further hearing held in this matter.

Chair MacLeod opened discussion regarding variance file number 08-V-089M1.

Dr. Frisch expressed concern regarding the precedent created by this situation in which applicants can submit paperwork right up to the 11th hour and receive conditional approval for variances. He stated that he understands the urgency, and in this particular case, he understands the improvement of safety that this variance provides. However, it sets a dangerous precedent that applicants can submit paperwork on the day before the hearing or on the day of the hearing and receive provisional approval, allowing staff to decide later whether it is substantively acceptable.

Mr. Beales responded that this is a situational anomaly, because if he had been in the office yesterday, he would have seen the paperwork and this would not be an issue. The decision as to whether or not the paperwork is acceptable is one of the areas of authority that the Board’s regulations grant to the hearing officer; thus the decision regarding the adequacy of the paperwork is going to be made by the hearing officer in any event.

Dr. Frisch asked whether the documentation for this variance that was included in the Board packet was the same as that received yesterday. Mr. Beales responded in the negative, stating that nothing like that is ever included in the Board packet. The proposed decision in the Board packet was prepared after receiving a scanned copy of a document, but the document received yesterday was not identical to the scanned document. Dr. Frisch again expressed his discomfort with the proposed process.

Chair MacLeod stated that one of the problems with the variance process for elevators is that the regulations have not been able to keep pace with the technology. Because of this, staff has developed templates to utilize in the variance hearing process to approve these variances in a more expeditious manner than going through the normal variance process. It is nonetheless understandable that Board members would be concerned by the direction in which Mr. Beales is asking the Board to go.

Mr. Prescott expressed agreement with Dr. Frisch’s concerns about the precedent being established.

Dr. Frisch added that if the documentation received in the office the previous day was identical to the previously received document, he might be more amenable to what is being proposed today. However, the fact that there are differences and Mr. Beales has not had an opportunity to examine it makes Dr. Frisch very uncomfortable.

A roll call was taken, and all members voted “aye,” with the exception of Dr. Frisch and Mr. Prescott, who both voted “no.” The motion passed.

C. OTHER

1. Board discussion/inquiry regarding the status of the Petition 507 related rulemaking and Board action, if and as deemed appropriate by the Board, directing Board staff to undertake actions regarding that rulemaking.

Ms. Hart stated that the work plan for the rulemaking pertaining to Petition 507 was presented to the Board in December 2009, and it is included in the Board packets today with updates. When the work plan was developed in December 2009, it was necessary for Board staff to make assumptions as to when each step would be completed. Several factors came into play, including the availability of Board staff, CARB staff, filter installers, equipment owners, as well as locating acceptable vehicles for the study. Putting the visibility test methodology in practice also posed some challenges that required modification to the methodology.

Notwithstanding the challenges with this project alone, staff also had to make assumptions on the complexity of other work assignments that would require Board staff attention, such as Federal Final Rules and petitions.

Overall, Ms. Hart is pleased that we have been able, along with the Air Resources Board, the Petitioners, the installers, and the other parties, to complete most of the tasks outlined on the work plan and to stay fairly true to course. The data collection is nearly complete, and the field study results are provided in the Board packet. In addition, Erik White will brief the Board today on the study and explain the difficulties involved in this process. The next step is to meet with the Governor’s office and obtain approval for the development of regulatory language. The Governor’s office has been contacted, and we expect to confirm the meeting date within the next week. As reported to the Board last year, the Governor’s office has asked for objective language that will allow for the reduction of particulate emissions and also provide for the safety of employees. In addition to crafting the regulatory language, we will also be developing the supporting documents. We anticipate an August public hearing date will not be possible; however, we believe that once approval is granted, we will be able to draft, finalize, and get approval so that the proposal can be moved as quickly as possible.

Ms. Hart asked the Board members to keep in mind that we are required by law to obtain certain approvals from the Labor and Workforce Development Agency and also to meet

specific Office of Administrative Law requirements prior to the publication of the Notice of Public Hearing for comment. The work that has taken place from December through May is consistent with the direction provided by the full Board in December 2009. We are prepared to continue with this work as instructed by the Board in December.

Erik White of the CARB staff stated that the in-use off road diesel regulation was approved by the Air Resources Board in 2007. CARB staff had observed that approximately 150,000 vehicles had been registered with CARB in that program. At its core, the regulation requires the turnover and the application of exhaust retrofits on diesel-powered construction equipment, mining equipment, and industrial equipment used throughout the state. The requirements phase in between 2010 and 2025, with varying dates of implementation based on the size of the fleet.

Currently the enforcement of the performance standards for the retrofits and internal requirements in that regulation are delayed, as CARB is pursuing authorization from the United States Environmental Protection Agency on California's authority to enforce that, and USEPA is expected to make a decision on that petition request later this year. In addition to that, because of the current state of the economy and the impact that this has had on emissions from off-road equipment throughout the state, the Air Resources Board has instructed its staff to go back and look for additional opportunities to provide regulatory relief to fleets that are subject to that regulation. CARB staff is currently in the process of developing a rulemaking proposal targeting on-road trucks in September of this year.

Throughout the development of the regulation and its implementation, issues surrounding the safety of the equipment, in particular the safety of retrofits, has been an important consideration. In its initial adoption, the regulation had provisions that would exempt vehicles from retrofit if that retrofit could not be done safely, and the regulations defer to the regulations of the Standards Board in making that determination. However, in consulting with industry representatives and other stakeholders, CARB discovered that there was a need for more specificity and a need for some objective requirements so that fleets knew what was and was not safe consistent with regulations adopted by the Standards Board.

In addition to that, Board staff and CARB staff as well as the petitioners met with staff at the Governor's office to discuss how to move forward and address the issues around retrofits on off-road equipment, in particular how to ensure to maintain a high level of safety for workers in the field while also maintaining the important health benefits of the diesel particulate regulation. The first direction from the Governor's office was to put in place an interim policy to address short-term safety concerns. The ultimate result of that direction is the interim policy that is currently in place and recognized by the Air Resources Board: no retrofits should be installed on a piece of off-road equipment if it impairs visibility to the front, rear, or sides. In addition, that meeting also produced some direction to work cooperatively together on evaluating the potential impacts of retrofitting off-road equipment and what type of masking or visibility impacts retrofits

may impose and determining what impact that may have on the anticipated health benefits of the diesel particulate regulation and whether or not there was a need for the establishment of some sort of *de minimus* masking standard to allow a certain number of retrofits to proceed in an attempt to balance the safety aspect with the air quality aspect of the two programs.

CARB staff has worked closely with both the Standards Board staff and Division of Occupational Safety and Health (Division) on developing a field study to evaluate any potential impacts on visibility that retrofits may pose and to develop a repeatable, objective method to quantify visibility impairments. After field testing it over several months, countless field visits, work-group meetings, and meetings with stakeholders, the end result is a field study that can be performed in the field on any vehicle with a very basic set up of materials and knowledge. As a test for that, CARB sent out students to determine whether they could repeat the test, and CARB is pleased that individuals with no specialized knowledge of the study could read the procedure and apply it in the field. This procedure standardizes where an operator of a vehicle would be in order to establish a uniform line of sight between that vehicle and a perimeter around that vehicle at different distances to understand how the installation of a retrofit on that vehicle might impair the operator's visibility.

The testing process identified 50 off-road vehicle models based on the vehicles reported to be the most common in the state and approximately 10 different types of vehicles, including excavators, graders, tractors, forklifts, and rollers, that ranged from 25 horsepower up to 600 hp. The work group also consulted with retrofit manufacturers to determine how they would approach a retrofit on a particular vehicle.

As the manufacturers observed different types of vehicles to determine how they would retrofit particular vehicles, a number of options were clearly identified, the most preferable being an underhood retrofit that replaced the existing underhood muffler in a way that visibility would not be impacted beyond the inherent visibility of the vehicle. On some vehicles, that was not entirely possible, and the next option was a muffler replacement, sometimes extending through the cowl of the vehicle or moving the battery box and installing a retrofit there. The option of last resort was a physical mounting on top of the engine compartment or somewhere else on the vehicle that was completely exterior to the vehicle. Several field visits were made with Standards Board staff, Division staff, and the Petitioners to look at various vehicle types, various installation options, and to apply the testing methodology in practice to make improvements where needed.

Of the 50 vehicle types tested, approximately 70% of them, which represents a significant proportion of the vehicles in the state, could be retrofit with zero impact on masking. Approximately 26% of the vehicles would have some impact, and approximately 4% did not have a retrofit option available. By looking at this 50-vehicle population, it is robust enough to apply to the entire statewide fleet in order to make a reasonable assessment of

what the impacts on air quality and emissions may be, taking into account vehicle masking as a limiting factor in terms of the ability to retrofit a vehicle.

The field study identified some very clear examples of vehicles that should not be retrofit. These vehicles would be exempted under both the interim policy and using the test method. There were some retrofits that appeared as though they would not impair visibility, but once they were tested using the jointly developed method, it was determined that they would not pass either the interim visibility policy nor the joint visibility test method.

The interim policy exempted approximately 25% of the vehicles that CARB thought could be retrofit, representing a substantial loss in emission benefits associated with the diesel particulate regulation. However, vehicles evaluated under the joint visibility test method represent a less than 1% of benefit associated with the regulation. This ensures that there can be safe installations of diesel particulate filters without compromising worker safety.

Chair MacLeod re-opened the Public Meeting to receive comments from the public.

Dave Harrison, Director of Safety for Operating Engineers Local 3, stated that he submitted comments on February 19 regarding CARB's draft visibility test. After what he assumed was communication between CARB and Standards Board staff, he finally received on April 8 an addendum to CARB's draft visibility test from Tom Mitchell along with a request to comment on the use of mirrors in as much detail as possible as soon as possible. This demonstrates to him that CARB continues to receive preferential treatment while stakeholders are left out in the cold. Mr. Harrison stated that Local 3 is still not satisfied with the proposed visibility test or the use of mirrors. Also, the fire and burn hazards need to be addressed, as they continue to be left out of any discussions, and Local 3 believes that zero additional blockage is the only acceptable answer. Local 3 realizes the staff is under some political pressure, but despite that pressure, they would like to see acceptable language noticed no later than the end of the year.

Kate Smiley of the Associated General Contractors of California expressed agreement with Mr. Harrison's comments.

Bruce Wick, Risk Management Director of the California Professional Association of Specialty Contractors, stated that the issue is a balance between chronic and acute exposure of employees to horrendous burns as well as the danger of being run over by a 50 ton piece of equipment. Thus, it is very important to get it right, and despite all the work that has been done to date, as demonstrated by both Ms. Hart's and Mr. White's presentations, there is more work yet to be done. The Air Resources Board, as Mr. White stated, is not only looking at the issue of the economy and how much that has already impacted air emissions but also the estimates that were used by the Air Resources Board in promulgating the original regulations that were off by 40% to 120%. That will affect the regulations that are promulgated in September. If 70% of these sample vehicles can

be safely and reasonably retrofitted, there is not a time frame towards air emissions that should slow the Standards Boards down in creating a great regulation on a very solid basis to protect employees from very acute, very hazardous exposures.

Peter Robertson of CalTrans, stated that he had reviewed the reports provided, and the use of a five foot threshold for visibility on the masking issue could be a problem. In fact, there are people working behind large machines that are at a height of 3½ feet rather than the five-foot threshold used in the testing.

CalTrans has been working for the last five decades to reduce the number of people exposed to running equipment. Currently, with the devices installed on CalTrans equipment, they have to use extra spotters, which increases the number of people on the ground. CalTrans trains their employees that eye contact with the operator of a machine is critical, and anything placed in the way of that is going to minimize people's ability to look at each other.

Another problem is that of the language used. He stated to one operator that he was going to mask the operator's loader, and operator's response was to ask whether he needed a respirator. He suggested that rather than use the term "masking," staff should use plain language such as "obstructed view."

Chair MacLeod asked about situations in which a worker might be at a 3½ foot level. Mr. Robertson responded that, in some operations, employees are in a crouched or kneeling position to place stakes in the ground.

Mr. Prescott asked whether the use of spotters is required because of retrofits that have been put on the equipment or if it a standard policy. Mr. Robertson responded that there is currently a spotter program in place in areas where there are a lot of people on foot or the operator really cannot see clearly. They try not to use the spotters because if there is an opportunity not to have another person on foot, they want to take advantage of that opportunity. Loaders and sand bars (?) usually are operated by one person without spotters.

Mr. Prescott asked whether CalTrans has equipment where a retrofit is causing a visibility blockage. Mr. Robertson responded in the affirmative.

Mr. Prescott asked whether Mr. Robertson had heard from CARB that those machines are exempt from the policy. Mr. Robertson responded that CARB and the CalTrans Division of Equipment have had some conversations about the interim policy, but his focus is on the safety of the employees.

Ms. Hart stated that the study about which Mr. White spoke was to determine the masking or the obstructed view with the retrofits. She expressed the desire to be very clear that in discussions of the rulemaking proposal, Board staff is discussing the burn

hazards, the fire hazards, the use of mirrors, and the structural stability of the equipment. Those have not been ignored. The study was focused on the obstructed view.

Dr. Frisch asked Mr. White about the five-foot target height for the visibility test as opposed to the 3½ foot height mentioned by Mr. Robertson. Mr. White responded that the lower height would have an impact on the findings of the study. The five-foot height was set based on an individual standing. He said that it would be a good idea to go back to the stakeholders and discuss whether five feet is an appropriate height or whether they should perhaps consider 3½ feet.

Dr. Frisch said that the percentage of vehicles that could be safely retrofit could be significantly reduced by using a 3½ foot target height. Mr. White responded that the question was raised in December what regulatory changes might need to be considered for the CARB regulation based on the eventual proposal by the Standards Board. This will present an opportunity in September to look at the CARB regulation in its entirety specifically to settle some of these issues.

Dr. Frisch asked what would constitute *de minimus* masking. He has not had any indication what the number might be. He was looking at the masking measures on the vehicles tested, and there were nine vehicles that had masking of some sort, with a range of 16 to 142 inches. He stated that there were two excavators that had visibility way off to the right side, and the rest of the equipment seemed to center between 16 and 80 inches. He asked whether it is safe to presume that the *de minimus* is going to be somewhere between 16 and 80 inches, based on the study. Mr. White responded that, based on the results of the study thus far, the masking impact on most vehicles is zero, which is consistent with what the Petitioners had requested. Other vehicles had significant masking, which indicates an “all or nothing” result.

Using the visibility test, CARB is comfortable with a zero masking policy, provisions that address burn hazards, and a standard that does not involve the use of mirrors. Based on that, he is comfortable that the potential rulemakings of both the Standards Board and CARB can achieve the desired reduction in diesel particulates without compromising employee safety.

Mr. Prescott asked whether the roller that had had its visibility significantly restricted (shown in one of Mr. White’s slides) was still in use. Mr. White responded that he did not know for sure, but he would certainly hope that the retrofit had been removed or the vehicle taken out of service. He stated that CARB has informed all fleets that they may remove retrofits, without any penalty or loss of credits received under the CARB program, if the retrofit does not pass the interim policy. They wanted to ensure that any retrofits that have happened or will happen in the near future are consistent with the interim policy.

Mr. Prescott asked whether CARB had sent out any sort of notice of the interim policy to everyone that had notified CARB that they had installed retrofits. Mr. White responded

in the affirmative, stating that it was posted on CARB's website, and an email message with the information was sent to their listserv. He was unsure whether CARB had contacted individually, all of the fleets that have retrofit vehicles or reported retrofit vehicles, but he would check to see if that had been done, and if it had not, he would get a notice out as soon as possible.

Mr. Prescott expressed concern regarding the perimeter around the vehicle in the proposed testing method. In certain vehicles, such as certain types of graders, the operator cannot see off to the side straight down just past the treads. He asked if that test had been changed. Mr. White responded that he was unsure whether it had been changed, but the procedure required a rectangle around the vehicle, with the first test point at 40 inches and ranging all the way out to 40 feet from the vehicle.

Mr. Prescott expressed concern that some of the equipment involved can reach speeds of up to 45 or 50 miles per hour, possibly raising the need to test visibility at further distances, and he asked whether that speed had been tested or considered. Mr. White expressed uncertainty about the answer to that question, but he stated that he would investigate that. He also extended an invitation to any Board members who might be interested to come out and see how the test methodology is used in practice in the field, stating that he would be happy to work with Ms. Hart in planning a "field trip" for the Board members. He stated that all the stakeholders had had an opportunity to see how the test methodology is applied in the field.

Mr. Mitchell stated that the test method in the handout measures masking at several locations. The first is at the rectangular boundary at 40 inches from the vehicle, and then the test continues to measure masking out to 40 feet at 5 feet height. The reason for measuring out to 40 feet is that if there is masking it gets wider the further away from the vehicle, if masking is allowed. The data shows that it would be acceptable to the ARB to not allow any masking at the rectangular boundary 40 inches from the vehicle, so there would not be any masking out at 40 feet. Thus, only the first part of the test is needed, which means that a person standing 40 inches away from the vehicle would be visible and there would be no masking allowed there at all. At that height and at that distance away, 5 feet and 40 inches, there would be no masking of any width. The operator would have unobstructed vision out further from that point. There would be no masking caused by the retrofit.

Mr. Prescott asked whether CARB would be satisfied if the interim policy of zero additional masking were to become the rulemaking proposal. Mr. White responded that CARB would continue to have a problem if the zero masking policy were not to have the test method as a corollary, objective piece. He stated that by using the field study methodology developed in conjunction with Standards Board and Division staff, CARB recognizes that although they will not get all of the retrofits that they initially anticipated, they will still get the necessary emissions reduction.

Mr. Kastorff asked whether employers are exempted from the retrofit requirement if there is any visibility obstruction whatsoever. Mr. White responded that, under the current interim policy, that is correct.

Mr. Kastorff asked whether there is a time limit on the interim policy. Mr. White responded that the interim policy would remain in place until the Standards Board adopts a rulemaking using the factors discussed today.

Mr. Jackson commended Mr. Robertson for bringing to everyone's attention the employees on foot who are at the most risk of injury, such as grade checkers, surveyors, or soil engineering technicians, who are kneeling or bent over and focused on something other than earth moving equipment to the point that they forget to maintain eye contact with equipment operators. He stated that people in the construction industry have learned, sometimes the hard way, that a back-up alarm is a really poor safety device. It depends on the person who hears it to understand it, know that it is coming towards them, and respond appropriately. On a job site with six or eight or ten pieces of equipment going and coming, workers very quickly develop selective deafness, and they learn to block out the noise of the back-up alarms. He emphasized the need to ensure that the test and the proposed standard address the three-foot height rather than five feet.

Mr. Washington expressed concern regarding the use of the term "masking," stating that it is unfamiliar to employers and employees in the field. He suggested using something more familiar, such as obstructed vision, blocked visibility, etc. Mr. White agreed that perhaps another term or phrase should be used.

Chair MacLeod stated that he was not at the November 2008 meeting at which Petition 507 was adopted, so he was not present for the approximately two hours of testimony and discussion that took place prior to the adoption of that petition. Normally, the Board's petition process is such that we attempt, normally through advisory committees, to resolve issues prior to noticing a proposal because of the time frames involved in adopting a regulation within the statutory deadline. The advisory committee process has served the Board very well in that regard, because issues can be resolved among the parties involved.

In this particular case, we had regulations that were in conflict on a collision course and they had to be resolved, and the Board decision with regard to resolving the matter did not include an advisory committee. He expressed the opinion that that was an appropriate decision because the issues and the unknowns were not amenable to an advisory committee process, and, the discussions that have taken place over this period of time were necessary in order to get to where we are today. The administration needs an opportunity to allow the agencies involved to work this out, and he commended both staffs in that regard, expressing the opinion that they have worked very well together. He stated that it has taken more time than we anticipated, but we are on the right course with the field test methodology.

He realizes that the Petitioners include both labor and management, and they are in concert with their feelings about this issue. However, that is not the entire regulated community and going into a rulemaking process when all the parties are not in concert could lead to problems with public comments; this is why we try to resolve these things prior to noticing proposed language, at which time everybody gets an opportunity to comment on the proposal. Staff has done a commendable job in getting us to this point, given the budget constraints, the staffing considerations, the furloughs, and other priorities.

Dr. Frisch stated that a lot of the trouble that we are facing with this particular issue could have been avoided if agencies had been talking to one another at the time the CARB regulation was being designed. This is a fundamental safety issue, and the concern of this Board is not air quality; the concern of this Board is fundamentally the health and safety of workers in the State of California. When a regulation is going to impact that health and safety, regardless of the agency, it is really incumbent upon the agency designing the regulation to make sure they have the expertise at the table.

He expressed sorrow to see a lot of effort going into this now because there are other things that are extremely important on which it would be nice to be spending more staff time, but we need to do this. If we are to learn one thing from this exercise, it is that it would be better if agencies were cooperating in advance of the rulemakings rather than trying to fix it after the regulation has been adopted.

Mr. Prescott stated that a lot of fuel to his fire last month was generated by the impression he received that once a petition decision is signed by the Board, the staff can pretty much do whatever they want, and he already had a feeling that we were going in a direction in this case that was different than what the Board had decided. In rereading the original petition decision, he found that staff was correct, and he apologized if he had upset staff by requesting disciplinary action, because it was not his intent. However, when he heard that staff can do whatever they want after a petition is adopted and he sees things going in a different direction than that indicated by the material leading up to the petition decision, he had some very major concerns. He suggested that perhaps the Board should examine how it writes its petition decisions; they tend to be general and very vague, and he wondered whether the Board would be better off if future petition decisions actually give staff better direction as to what the Board's intent is.

Chair MacLeod stated that we could do that. It is always advisable over time to look at how things are done, and the review of the petition decision process could be placed on the agenda of a future meeting. In this case, the direction that Board gave staff was very clear. He expressed uncertainty as to where Mr. Prescott heard that staff can do whatever they want once a petition decision is signed, but usually a petition decision is to deny the petition or to grant it to the extent that an advisory committee be convened. However, a review of the petition decision process could certainly be placed on the agenda of a future meeting.

Chair MacLeod then expressed agreement with Dr. Frisch's comments regarding the need for agencies to consult with one another prior to adopting a regulation that might impinge on the regulations of another agency.

2. Legislative Update

Mr. Beales stated that, in addition to the legislative update in the Board packet, AB 1562, the ski industry bill was amended regarding locations where certain information is to be available. AB 2738, which pertains to the Administration Procedure Act, and AB 2744, which deals with a Labor Code matter, both were moved along in the committee process.

3. Executive Officer's Report

Ms. Hart stated that an advisory committee meeting was convened earlier this month for container-handling rubber-tired gantry cranes, and there are two upcoming advisory committees to be convened by the Division in June.

4. Future Agenda Items

Chair MacLeod repeated Mr. Prescott's request for a review of the petition decision process.

D. CLOSED SESSION

The Board discussed only the closed session item listed on the Agenda, and no action was taken during the closed session.

E. ADJOURNMENT

Chair MacLeod adjourned the Business Meeting at 11:58 a.m.